IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A.O.NO.980 OF 2004

Vaikunthanath S. Jagannath .. Appellant
(Org. Plaintiff)

vs.

Abdul Karim Peer Mohd
@ Abdul Karim Malwavala .. Respondent.
(Org. Defendant)

Mr. Sunil Jaykar, Advocate for the Appellant.

Mr.Subodh Joshi i/b. Pandit & Pandit, Advocate for the Respondent.

CORAM : A.S.OKA, J.

DATED : 22nd March, 2005.

P.C. :

1. Heard learned Counsel appearing for the parties. The Appeal is preferred by the Original Plaintiff taking exception to order dated 12.10.2004 passed by the learned trial Judge by which the Chamber Summons No.551 of 2004 taken out for bringing on record the legal representatives of the deceased defendant has been dismissed on the ground that there is no specific prayer made for setting aside the abatement of the suit.

2. The learned Counsel appearing for the Appellant submitted that infact in the affidavit in support filed to the Chamber Summons reasons for delay in filing the Chamber Summons have been set out and though no specific prayer was made for setting aside the abatement and for condonation of delay, a case is in fact made out for setting aside the abatement. He, therefore, submitted that the learned trial judge ought not to have taken a very technical view of the matter.

3. The learned Counsel appearing for the Respondent has supported the impugned judgment and order and has contended that the Chamber Summons was not maintainable.

4. I have considered the rival submissions. The Chamber Summons taken out by the Appellant was for bringing on record the legal representatives of the deceased defendant. A perusal of the affidavit in support of the Chamber Summons shows that that necessary averments were made for explaining the delay and for setting out the sufficient cause for setting aside the abatement.

The learned Judge could have taken liberal view of the matter and considered the prayer for condonation of delay and for setting aside of abatement. In any event, the learned Judge ought to have granted time to the Appellant to amend the Chamber Summons. However, that was not done.

5. In the circumstances, the impugned judgment and order deserves to be quashed and set aside and permission deserves to be granted to the Appellant to amend the Chamber Summons for incorporating the prayer for condonation of delay and for setting aside abatement of the suit. Hence I pass the following order.

i) The impugned judgment and order dated 12.10.2004 is quashed and set aside and the Chamber Summons No.551 of 2004 is restored to the file.

ii) The Appellant is permitted to amend the Chamber Summons No.551 of 2004 for the purpose of incorporating prayer for condonation of delay and for setting

aside abatement.

iii) Amendment to be carried out within a period of six weeks from today.

iv) The parties will appear before the learned trial Judge on 11.4.2005. The learned trial Judge after permitting the Appellant to carry out the amendment will permit both the parties to file further affidavits and will decide the Chamber Summons as expeditiously as possible and in any event on or before 31.8.2005.

v) The Appeal is partly allowed in above terms with no order as to costs.

vi) Parties and the concerned Court to act on the authenticated copy of this order.

(A.S.Oka, J.)